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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1349

ROBERT HOWARD BROWN, also known as
HOWARD BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

ROBERT HOWARD BROWN also known as
HOWARD BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Robert Howard Brown, also known as Howard Brown, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on February 18, 1972. Rehearing was denied on March 20, 1972.

Opinions Below

The opinion of the United Statees Court of Appeals for the Third Circuit is not yet reported and it is set out in Appendix "A", pp. 1a-5a.

The petitioner was originally convicted following a trial by jury in the United States District Court for the Western District of Pennsylvania; no opinion exists with respect to that conviction.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 18, 1972; a timely filed petition for rehearing with a suggestion for rehearing before the Court *in banc* was denied on March 20, 1972. Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Questions Presented for Review

1. Does the Fourth Amendment exclusionary rule prevent the introduction of evidence when the affidavit presented to obtain the search warrant contained an admittedly untruthful statement of material fact?

2. Did the references in closing argument of prosecutor to petitioner as a "heroin trafficker" though there was no evidence or charge of such constitute a failure to observe the fundamental fairness concept?

Constitutional, Statutory and Other Provisions Involved

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U. S. C., SECTION 111

ASSAULTING, RESISTING, OR IMPEDING CERTAIN OFFICERS OR EMPLOYEES

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 688.

26 U. S. C., SECTION 4704(a)

PACKAGES

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the

original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession the same may be found.

RULE 41(e) of the FEDERAL RULES OF CRIMINAL PROCEDURE
SEARCH AND SEIZURE

* * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Statement of the Case

Petitioner was convicted on April 29, 1971 in the United States District Court for the Western District of Pennsylvania for assaulting agents of the Bureau of Narcotics and Dangerous Drugs with a deadly weapon in violation of 18 U. S. C. 111 and sentenced to a term of imprisonment for ten years and to pay a fine of $2,500.00.

A shooting of a federal agent occurred after midnight on February 12, 1971, at the door of petitioner's home when several agents sought to make a warrantless arrest of petitioner for possession of heroin in violation of 26 U. S. C. 4704 (a). During daylight hours of the same day a search warrant was issued upon the affidavit of Donald L. Ashton. The affidavit and attachment to affidavit are reproduced in full as Appendix K, pp. 51a-54a.

The affiant, Ashton stated that, in addition to information received from an unidentified informant, shortly before the shooting incident he and other agents had made a warrantless arrest of petitioner's wife and seized two jars of heroin in her car. The same assertion was made by Ashton in a Complaint against Brown for violation of 26 U.S.C. 4704 (a). (Appendix D, pp. 8a-9a).

The material in the two jars was lactose. (Appendix L, pages 55a-57a).

In the search of petitioner's home pursuant to the warrant minute quantities of heroin residue were found.

The Government elected not to seek an indictment for the violation of 26 U. S. C. 4704 (a) until August 11, 1971 (Appendix E, pp. 10a-13a) nearly four months after this case was tried.

Petitioner, concerned that he would have several trials at different times for charges growing out of the same transaction and that the Government would seek to introduce at this trial evidence of other criminal acts, sought to consolidate this case with the other charges (Appendix F, pp. 14a-15a and Appendix H, pp. 17a-20a). The Motion to Consolidate was denied (Appendix G, 16a).

The Government did seek to introduce the evidence seized pursuant to the search warrant. The district court permitted counsel to make an Oral Motion to Suppress and denied the motion (Appendix L, pages 55a-57a).

The district court also permitted the prosecutor, over objection, to refer to the heroin evidence in his opening, in the questioning of witnesses and in his closing. In his closing argument the prosecutor on several occasions referred to petitioner as a "heroin trafficker" though there was no evidence in the trial that more than minute quantities of the drug had been found in his house.

The Court of Appeals sustained the actions of the district court in denying the motion to suppress and in permitting references to petitioner as a "heroin trafficker" (Appendix A, pp. 1a-5a). On March 20, 1972, a petition for rehearing was denied by the panel of the Court of Appeals which decided the case and a majority of members of the court in regular active service voted against a rehearing *in banc* (Appendix C, p. 7a).

REASONS FOR GRANTING THE WRIT

I. The introduction of evidence when the affidavit presented to obtain the search warrant contained an admittedly untruthful statement of material fact violated the Fourth Amendment exclusionary rule.

The recurring question of the technical sufficiency of affidavits to support search warrants in view of the Fourth Amendment's prohibition against unreasonable searches and seizures has occupied much of this Court's time. There is concern, if not alarm, that the use of the exclusionary rule interferes improperly with the truth-seeking function of the judicial process.

Recently, this Court in *United States v. Harris*, 403 U. S. 573, heeds the admonition of *United States v. Ventresca*, 380 U. S. 102, that "technical requirements of elaborate specificity . . . have no proper place in this area."

Here the issue is whether the affidavit in question, assuming its technical sufficiency, established probable cause when purged of admittedly false information.

In *Rugendorf v. United States*, 376 U. S. 528, in which the trial court ruled on the truthfulness of the affidavit, this Court, through Mr. Justice Clark, stated:

> "This Court has never passed directly on the extent to which a Court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish probable cause . . ."

It has been suggested that "the time is ripe for a decision on this question, for the courts are in conflict and the question is important to the proper administration of justice." Kipperman, "Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence," 84 *Harvard Law Review* 825.

There is no clearly defined mechanism for court review of the factual sufficiency of an affidavit. Much of the limited judicial attention to this matter has been on the issue of what a defendant must do in order to justify a hearing on this ground. Wright, *Federal Practice and Procedure*, Section 673 at pages 106 and 107.

Here, however, discussion of what mechanism will best serve the interests of justice is unnecessary, for a federal agent testified before the court entertained the oral motion to suppress that the material in the car of petitioner's wife was lactose and not heroin as asserted in the affidavit (Appendix L, pages 55a-57a). Further, a simple taste test would have shown the difference before the agents went to petitioner's home at midnight. But the affidavit was not drafted in the haste of a midnight criminal investigation; it was drafted and sworn to many hours later while petitioner's home was occupied and secured by federal agents.

The inaccuracy here was directly relevant to the showing of probable cause. In fact, the affidavit, stripped of the inaccuracy, would be defective. Thus this case is unlike *Rugendorf*. There, (376 U. S. at 532) this Court, assuming the availability of the challenge to accuracy, *arguendo*, did consider the allegations of inaccuracy but found "(t)he factual inaccuracies depended upon . . . were of only peripheral relevancy to the showing of probable cause."

There are two compelling reasons for granting the writ on this issue: (1) confusion and conflict among the circuits and the lower courts; and (2) the need to determine whether there is justifiable interference with the truth seeking process if truth—heroin in petitioner's home—can be found only if untruths are used to permit the search.

We specifically urged the Third Circuit in the appeal and in the petition for rehearing to adopt the reasoning and holding of the Fifth Circuit in *United States vs. Upshaw*, 448 F. 2nd 1218:

> "Once it came to the attention of the court from the testimony at the motion to suppress hearing, that evidence had been seized on the basis of statements of facts erroneously made by the affiant which struck at the heart of the affidavit's showing of probable cause, the Court was required to grant the motion. The judicial system cannot be a party to the use of tainted evidence on the basis that, arguably, the defendant was not entitled to bring to the attention of the Court what the Court has come to know anyhow."

For collections of earlier conflicts, see Kipperman, *supra*, Wright, *supra*, 67 Columbia Law Review 1520, 51 Cornell Law Quarterly 822, 34 Fordham Law Review 740 and 44 Connecticut Bar Journal 9.

The rash of decisions on the technical requirements of affidavits has resulted in more sophisticated approaches by law enforcement officers to meet those technical requirements. That the decisions have not discouraged illegal searches and seizures is revealed in a study reported by Dallin H. Oaks in "Studying the Exclusionary Rule in Search and Seizure", 37 *University of Chicago Law Review* 665. It is suggested that the exclusionary should be abolished, but not quite yet.

The time has not yet come that non-facts should be treated as facts. This would not be frustration of law enforcement activities by technicalities; this would be an invitation to perjury.

Though the magistrate stands in the scheme of things as the primary bulwark for the citizen's privacy, it is the courts which must stand as the primary bulwark for the citizen's liberty. And it is petitioner's liberty at stake.

II. References in closing argument of prosecutor to petitioner as a "heroin trafficker" though there was no evidence or charge thereof constituted a failure to observe the fundamental fairness concept.

In *Lisenba v. California*, 314 U. S. 219, this Court stated:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

This basic principle is not applicable merely by its recitation. The burden of showing the quality of the acts complained of is clearly upon petitioner. It is a burden he accepted from the beginning because the risk of prejudice was real once the Government elected and was permitted to go to trial on the charge of violation of 18 U. S. C. 111 only. From the beginning he was fearful that even the mention of that harsh and death-producing drug, heroin, would infect his assault trial with unfairness. He sought to restrict the mention of heroin in the opening argument. He was unsuccessful (Appendix I, pp. 21a-32a).

At all times he asked the district court to exclude the evidence of an alleged crime for which he was not standing trial.

It is suggested here, as it was below, that in the context of our times, the mere mention of heroin in a trial for another offense before a jury is likely to prejudice the defendant. With that, there was no quarrel. Countervailing principles of the law of evidence supported the admissibility of evidence of possession of heroin, however.

That the prosecutor was aware of the probable effect of the repeated mention of heroin possession upon the jury is evidenced by ten recitations of this in his comparatively brief closing argument (Appendix J, pp. 32a-54a).

Beyond the limits of fairness, however, were the uncalled for and unsupported by the evidence declarations to the jury that petitioner was a "heroin trafficker" (Appendix J, pp. 32a-54a). What was "heroin possession" had become "heroin trafficking." What was fair comment had become that fundamental unfairness of which this Court spoke in *Lisenba*.

Many years ago, in *Hall v. United States*, 150 U. S. 76 this Court condemned such tactics for what many considered to be for all time:

> "The attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of a crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty. . . ."

The petitioner here had not even been accused of being a heroin trafficker; he had not even the dignity of a judicial acquittal. When these words were said, he had only been accused—and accused only of heroin possession (Appendix D, pp. 8a-9a).

It is because of the complete frustration of his efforts to have a fair trial that petitioner asks this Court to grant the writ on this issue. Were it to be granted, it would have the salutary effect of admonishing officers of the Government to pay more than lip-service to the principle of joining in one indictment and one trial acts or transactions connected together. (Fed. Rule Cr. Proc. Rule 8.)

Conclusion

This case is an example of problems created when an attempt is made to force a defendant to run the gauntlet of several trials. The unfairness created thereby was exacerbated by the refusal to enforce the non-technical requirements for a showing of probable cause. It is respectfully submitted, therefore, that the petition for writ of certorari be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1497

UNITED STATES OF AMERICA,

v.

ROBERT HOWARD BROWN, a/k/a
HOWARD BROWN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted under 3rd Cir. Rule 12(6) December 14, 1971[1]

Before Van Dusen and Hunter, Circuit Judges, and Layton, District Judge.

Opinion of the Court

(Filed February 18, 1972)

PER CURIAM:

This appeal challenges an April 29, 1971, judgment of conviction and commitment based on a jury verdict finding

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[1] Effective September 1, 1971, this court adopted its Rule 12(6), providing as follows:

(Footnote continued on following page)

defendant guilty of a one-count indictment charging the defendant with assaulting, resisting, and interfering with the United States officers of the Bureau of Narcotics and Dangerous Drugs while engaged in the performance of their official duties, in violation of 18 U. S. C. § 111. One such officer was shot by defendant about midnight when he was in the process of ejecting his local Police Chief from his home,[2] after such Chief had informed him that there were federal narcotics agents outside who wanted to see him. Thereafter, there were sounds of water running in the house and 30 minutes later defendant came out and surrendered.

(Footnote continued from preceding page)

"(6) *Oral Argument.* Oral argument may be dispensed with, or shortened, by an unanimous order of the panel to which the case has been assigned. The Clerk shall notify in writing the parties or their counsel of any such action."

This rule was published in the Pittsburgh Legal Journal, among other legal publications in this Circuit, on August 24, 1971, and copies of it were mailed to all those who had secured copies of this court's Rules from the Clerk. See, also, September 20, 1971, Advance Sheets of Federal Reporter (Second Series), p. LXIII. When appellant filed his brief on September 28, 1971, notice of Rule 12(6) had been available to him for over a month and he had the opportunity to file a reply brief to appellee's brief filed November 1, 1971, in anticipation that oral argument might not be available to him. On December 2, 1971, by unanimous decision of the panel assigned to dispose of this appeal, an order was entered directing that this case be determined without oral argument under Rule 12(6), and notice of this decision was sent to counsel on December 2, 1971. On December 8, 1971, appellant filed a motion "for leave to present oral argument in support of his appeal in spite of the direction of the court that no oral argument shall be held pursuant to Rule 12(6)." This motion is being denied. See *Huth v. Southern Pacific Company*, 417 F.2d 526, Part I (5th Cir. 1969); Carrington, *Crowded Dockets in the Courts of Appeals: The Threat To The Function of Review and National Law*, 82 Harv. L. Rev. 542, 556-561 (1969); Christian, *Using Prehearing Procedures To Increase Productivity*, 52 F. R. D. 55 (1970).

[2] During the struggle between the Police Chief and defendant, the federal agents had come up on the porch and said, "Police, drop the gun. Federal Agents, drop the gun."

Defendant objects to the Government's referring in its opening and closing arguments to the circumstances which led the agents to Brown's residence, namely, the belief that Brown possessed heroin[3] and that, after a search warrant for the premises had been secured the next morning, the presence of heroin in a drainpipe from the laundry sink and in a glass jar found in an upstairs closet was determined. After a careful consideration of the record, we can find no reversible error in the rulings of the trial judge admitting this evidence[4] and permitting the above-described arguments. See *United States v. Todaro*, 448 F. 2d 64, 67 (3d Cir. 1971), and cases there cited; *United States v. Ferrone*, 438 F. 2d 381 (3d Cir. 1971).

Secondly, defendant contends that his motion to suppress the gun and the heroin residue should have been

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[3] Also Brown was referred to in the following wording as "a heroin trafficker" at one place in the prosecutor's closing argument concerning the reasonableness of his using a gun (see footnote 4 below) when asked to talk to the federal narcotics agents:

> "Did Brown do what was reasonable? I have to answer that question twice. I suppose for a heroin trafficker, perhaps he did do what was reasonable. For a citizen, no, he didn't do what was reasonable.
>
> "And the question of reasonableness is not so much the reasonableness of his act as the reasonableness of his belief."

As noted above, heroin was found in the drainpipe and glass jar in the defendant's house. Furthermore, earlier during the evening of the shooting of the federal officer, defendant's wife had driven from his home in a car containing two jars containing lactose (a cutting agent for heroin) and had been arrested as a result of the receipt from a government informant of information that she was to make a delivery of narcotics that evening (see footnote 5 below).

[4] We note that the evidence was also admissible to refute the defense that Brown acted reasonably in shooting the agent because he believed he was being robbed, see *United States v. Antrobus*, 191 F.2d 969, 971 (3d Cir. 1951), *cert. denied*, 343 U. S. 902 (1952), and was a necessary ingredient in explaining the crime in question. See *United States v. Bozza*, 365 F.2d 206, 212-14 (2d Cir. 1966); *Hanks v. United States*, 388 F.2d 171, 174-75 (10th Cir. 1968), *cert. denied*, 393 U. S. 863 (1968).

granted. The Affidavit for Search Warrant (15a-18a) justified the search for heroin and the gun.[5] See *United States v. Singleton*, 439 F. 2d 381 (3d Cir. 1971); *cf. Harris v. United States*, 403 U. S. 573, 577-583 (1971).

Finally, defendant claims that a new trial is required due to the admission in evidence of a prior consistent statement made by a Government witness in a state court hearing five days after a prior inconsistent statement by such witness had been testified to by a defense witness.[6] Particularly in view of the curative instruction given by the trial judge (87a-89a), we have concluded that this contention must be rejected. See IV Wigmore, Evidence (3d Ed.), § 1126, p. 202; *United States v. DeLarosa*, — F. 2d — (3d Cir., 9/27/71, p. 7 of slip opinion); *cf. United States v. Grosso*, 358 F. 2d 154, 158 (3d Cir. 1966), *rev'd on other grounds*, 390 U. S. 62 (1968).

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[5] The receipt of information from "an informant under the supervision of the Bureau of Narcotics and Dangerous Drugs" to whom a number had been assigned and who allowed the Special Agent to monitor the call from defendant, stating that "two pieces" (heroin) would be delivered to the informant at a certain restaurant by defendant's wife, confirmation of defendant's name, address and phone number as revealed by the informant, observation of the wife leaving defendant's home in her car and proceeding toward the restaurant, the finding of jars of lactose (a substance used as a cutting material for heroin) in the back of the car, and the informant's statement that defendant told him he had $40,000. of heroin in his possession, constituted sufficient information. As to the gun, it is not necessary to rule on the Government's contention that no warrant was needed to seize a gun which could be used, and had already been used once, to inflict harm on law enforcement agents because the search warrant was valid. See *Chimel v. California*, 395 U. S. 752, 762-63 (1969).

[6] On direct examination the Government witness (a local Police Chief) testified that while he was backing out of defendant's front door, "the door sort of closed and as I was getting out of a crouched position,

(Footnote continued on following page)

The April 29, 1971, judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(Footnote continued from preceding page)
the door opened and that is when the shot was fired" (N. T. 157). The defense witness (a local reporter) testified that the Police Chief had told him a few hours after the shooting, "I grabbed the barrel and was pushing it downward when he pulled the trigger and the rifle fired" (N. T. 316). The reporter also testified that the Police Chief had given the following testimony at a Magistrate's hearing five days after the shooting: "I then let go of the barrel and was backing out the door when he fired the rifle. It struck the agent." (N. T. 327).

APPENDIX "B"

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1497

UNITED STATES OF AMERICA,
vs.
ROBERT HOWARD BROWN, a/k/a
HOWARD BROWN,
Appellant.

(D. C. Criminal No. 71-9)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Van Dusen and Hunter, Circuit Judges and Layton, District Judge.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, dated April 29, 1971 and filed April 30, 1971, Present:
be, and the same is hereby affirmed.

Attest:

THOMAS P. QUINN,
Clerk.

February 18, 1972.

APPENDIX "C"

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1497

UNITED STATES OF AMERICA,

v.

ROBERT HOWARD BROWN, a/k/a
HOWARD BROWN,

Appellant.

Present:

Seitz, Chief Judge, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Rosen, and Hunter, Circuit Judges, and Layton, District Judge.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

/s/ FRANCIS L. VAN DUSEN,
Judge.

Dated: March 20, 1972.

APPENDIX "D"

Complaint for Violation of U. S. C. Title 26 Section 4704 (a)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

ROBERT HOWARD BROWN and JOANNE BROWN.

Commissioner's Docket No.
Case No.

BEFORE Alexander McNaugher, Pittsburgh, Pennsylvania.

The undersigned complainant being duly sworn states:

That on or about February 12, 1971, at 206 Cool Springs Road, White Oak, Pa. in the Western District of Pennsylvania, Robert Howard Brown and Joanne Brown did knowingly and unlawfully possess a narcotic drug to wit: heroin hydrochloride.

And the complainant states that this complaint is based on information received from SD-210002 and corroboration of such information led to the arrest of Joanne Brown on February 11, 1971, in Forrest Hills, Pa. in possession of approximately 2 kilograms of suspected heroin. Based upon further information supplied by SD-210002 and corroboration of this information that Robert Howard Brown was also in possession of narcotic drugs at his residence,

206 Cool Springs Road, White Oak, Pa., the agents proceeded to the above address to arrest Brown, and were met with armed resistance from Brown. At this time, Brown fired a shot from a rifle and seriously wounded Special Agent Burton E. Lund. Subsequently Brown was taken into custody and a Federal Search Warrant was issued for Brown's residence at 206 Cool Springs Road, White Oak, Pa. Upon execution of the Federal Search warrant at 206 Cool Springs Road, White Oak, Pa., on February 12, 1971, by Special Agents Thomas G. Moore, Joseph P. D'Addio, John M. Guseman and Richard C. Weatherbee and the following items were seized: A container containing a residue of suspected heroin which gave a positive field test for the presence of a narcotic drug. Water recovered from the trap of a sink which when field tested gave a positive reaction for the presence of a narcotic drug.

are material witnesses in relation to this charge.

(Illegible),
Signature of Complainant.

(Illegible),
Official Title.

Sworn to before me, and subscribed in my presence, Feb. 12, 1971.

ALEX L. McNAUGHER,
United States Commissioner.

APPENDIX "E"

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

HOWARD BROWN a/k/a ROBERT HOWARD BROWN
and JOANN BROWN a/k/a JOANN DAVIS.

No. 71-156 Criminal
(18 U. S. C., Section 2,
21 U. S. C., Section 174 and
26 U. S. C., Section 4704(a))

The grand jury charges:

On or about the 11th day of February, 1971, at White Oak, in the Western District of Pennsylvania, the defendants, Howard Brown a/k/a Robert Howard Brown and Joann Brown a/k/a Joann Davis, unlawfully, wilfully and knowingly did receive, conceal and facilitate the transportation and concealment of a narcotic drug, that is, diacetyl morphine hydrochloride, commonly known as heroin, a derivative and preparation of opium, the exact quantity of said heroin being to the grand jury unknown, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law.

In violation of Section 174 of Title 21, United States Code and Section 2 of Title 18, United States Code.

True Bill 8/11/71.

SECOND COUNT

The grand jury further charges:

On or about the 11th day of February, 1971, at White Oak, in the Western District of Pennsylvania, the defendants, Howard Brown a/k/a Robert Howard Brown and Joann Brown a/k/a Joann Davis, did unlawfully purchase and possess a narcotic drug, that is, diacetyl morphine hydrochloride, commonly known as heroin, a derivative and preparation of opium, the exact quantity of said heroin being to the grand jury unknown, not in or from the original stamped package as required by Section 4704(a) of Title 26, United States Code, contrary to the provisions of Section 7237 of Title 26, United States Code.

In violation of Section 4704(a) of Title 26, United States Code and Section 2 of Title 18, United States Code.

THIRD COUNT

The grand jury further charges:

From sometime prior to February 12, 1971, the exact date being to the grand jury unknown, and continuing thereafter up to and including February 12, 1971, in the Western District of Pennsylvania, the defendants, Howard Brown a/k/a Robert Howard Brown and Joann Brown a/k/a Joann Davis, did wilfully and knowingly combine, conspire, confederate and agree together and with divers other persons to the grand jury unknown, to violate Section 174 of Title 21, United States Code.

2. It was a part of said conspiracy that the defendants would wilfully and knowingly receive, conceal and facilitate the transportation and concealment of narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law.

3. It was further a part of the conspiracy that the defendants would dilute, mix and adulterate these narcotic drugs.

4. It was further a part of the conspiracy that the defendants would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

For the purpose of carrying out the said conspiracy and to effect the object and purpose thereof, the following overt acts were committed:

1. On or about February 11, 1971, the defendant, Howard Brown a/k/a Robert Howard Brown, placed a telephone call to arrange for the delivery of a quantity of heroin and certain diluting or cutting material.

2. On or about February 11, 1971, the defendant, Joann Brown a/k/a Joann Davis, left her residence at 206 Cool Springs Road, in her automobile and proceeded toward the Dennis Diner on Route 30.

3. On or about February 11, 1971, the defendant, Joann Brown a/k/a Joann Davis, transported in her automobile two jars containing lactose.

4. On or about February 11, 1971, the defendants, Howard Brown a/k/a Robert Howard Brown and Joann Brown a/k/a Joann Davis, possessed and concealed in their residence at 206 Cool Springs Road, certain diluting mate-

rials and cutting paraphernalia commonly used in cutting and diluting heroin.

5. On or about February 12, 1971, the defendant, Howard Brown a/k/a Robert Howard Brown, shot Special Agent Burton Lund.

In violation of Section 174 of Title 21, United States Code.

A True Bill.

/s/ .....,
Foreman.

/s/ Richard L. Thornburgh,
United States Attorney.

APPENDIX "F"

Motion to Postpone and Consolidate Indictments and Charges for Trial

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

VS.

ROBERT HOWARD BROWN a/k/a HOWARD BROWN.

No. 71-9 Criminal (18 U. S. C., Sec. 111)
No. 71- Criminal (18 U. S. C., Sec. 922 (a) (6) 922(h) and 924 (e)(1)
No. 71- Criminal (26 U. S. C. 4704 (a)

AND NOW, comes the Petitioner, Robert Howard Brown, Defendant in the above captioned matters, by his attorney, Wendell G. Freeland, and respectfully moves this Honorable Court to postpone the trial on the indictment at 71-9 Criminal, and consolidate this indictment and the pending charges listed above for trial. In support of this motion your Petitioner sets forth the following reasons:

1. Charges against your Petitioner stem from your Petioner's arrest without a warrant at his residence for an alleged violation of the Federal Narcotics Law, during which a federal narcotics agent was shot.

2. The case at Indictment No. 71-9 Criminal has been set for call of the trial list on April 6, 1971 at 10:00 a. m. in Courtroom No. 2.

3. In order to show probable cause for your Petitioner's arrest on the charge at 71-9 Criminal, the government will necessarily have to introduce the same evidence that will be used in the other pending charges.

4. Your Petitioner has not yet been indicted on the Complaint charging a violation of 26 U. S. C. 4704 (a), as a chemical analysis of the evidence has not yet been performed.

5. Your Petitioner has not as yet been indicted on the Complaint charging a violation of 18 U. S. C. 922.

6. The charges against your Petitioner are of such a nature that they could have been joined in one indictment under Rule 8 of the Federal Rules of Criminal Procedure.

7. The expense of and time consumed in trial would be substantially reduced if these charges are tried together.

WHEREFORE, your Petitioner respectfully prays this Honorable Court to postpone the trial of your Petitioner at No. 71-9 Criminal until such time that all indictments and charges may be consolidated for trial.

Respectfully submitted,

WENDELL G. FREELAND.

APPENDIX "G"

Order

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT HOWARD BROWN, a/k/a HOWARD BROWN,
Defendant.

Criminal No. 71-9

AND NOW, this 5th day of April, 1971, upon consideration of defendant's motions for suppression of evidence and to postpone and consolidate indictments for trial, and it appearing that no indictments have been returned against defendant except at Cr. 71-9 for assaulting a federal officer, and that the other indictments defendant anticipates may be returned against him are at present merely speculative, and the motions therefore premature, and it also appearing that questions as to admissibility of evidence are appropriate for determination by the trial Judge,

IT IS ORDERED that said motions be and the same hereby are denied.

/s/ DUMBAULD,
United States District Judge.

Copies to:

Wendell G. Freeland, Esq.,
Lichtenstein and Bartiromo,
619 Plaza Bldg.,
Pittsburgh, Pa. 15219.

Richard L. Thornburgh,
United States Attorney,
United States Courthouse,
Pittsburgh, Pa. 15219.

APPENDIX "H"

Excerpts of Proceedings of April 6, 1971

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

ROBERT HOWARD BROWN,

Defendant.

Criminal Action
71-9

Excerpt of Proceedings held at Call of Criminal List on April 6, 1971 before the Honorable Edward Dumbauld, District Judge.

Appearances:

For the United States: Charles F. Scarlata, Esq., Assistant United States Attorney.

For the Defendant: Wendell G. Freeland, Esq.

Official Reporter: Marvin D. Cutright.

(Excerpt of proceedings from Call of the Criminal List, before Honorable Edward Dumbauld, District Judge, on April 6, 1971.)

The Court: Robert Howard Brown.

Mr. Scarlata: The government is ready, your Honor.

Mr. Freeland: Your Honor, I received this morning a copy of your order relating to motions to consolidate indictments and charges and to postpone.

The order reads to postpone. That motion related merely to postponing consolidating indictments.

This is a single transaction. The charge at No. 71-9 is assaulting a federal officer.

The Court: Yes.

Mr. Freeland: The other two cases are necessarily a piece of the same case.

The Court: Well, they were violations of the gun law, I think.

Mr. Freeland: One of them is in fact violation of the new gun law, particularly the third part of it, which is having a gun and using it for a purpose which was contrary to the laws of the United States; to wit, assaulting a federal officer, and even though the other two sections do not necessarily involve the same transaction, certainly 924(c) does.

The Court: But there are no indictments on any of these other cases.

Mr. Freeland: I understand this. That is why my motion was not to consolidate indictments but to consolidate with the other charges, all of which grew out of the same trans-

actions. The other charge is for narcotics. I don't know whether the court gathered from my motion that I consider it to be the same transaction—

The Court: Yes, but very happily perhaps if your client is acquitted on the indictment against him or vice versa, maybe nothing will ever happen on those other charges.

Mr. Freeland: I am afraid that I would much prefer not to rest on the argument after this case that the government could not try him on the other charges inasmuch as there are only three justices of the Supreme Court who would say that in a single transaction he should not be required to run the gauntlet.

The Court: Well, maybe it will never happen. I mean it is premature to consider at this time anything about the other charges.

Mr. Freeland: Well, I believe that the prosecutor in this case in choosing to pursue the one when the information —and I'm talking about data—were gathered all at the same time—

The Court: Well, that may just be to promote good morale among the law enforcement officers. I understand if an FBI man is killed, Mr. Hoover takes it very seriously, and if a federal officer is assaulted in the line of duty, maybe the government could properly consider that more important than failing to register a gun.

Mr. Freeland: Also the government does not by the penalties that are set forth in the several statutes, including the narcotics statute, and the government did not in its judgment as to the bond that should be set in the separate cases consider the shooting of the federal officer to be of the same value in dollars as the narcotics case, and when I sought reduction of bond, Judge Weber considered the narcotics case and the shooting of a federal officer of the same dollar value in terms of bond.

As far as I am concerned, I have read your order and I raise the issue now because I knew that there were no indictments in the other cases.

The Court: Yes. Well, I am fully convinced that my order is correct, and if it is appealable, you can appeal it. Maybe it will never become important if your client is tried and acquitted.

Mr. Freeland: Well, if the government were willing to say that it only wanted to proceed on one case and would dismiss it—

The Court: That is all they are proceeding on now at this time. Anything else is speculative, so there is only one pending case, so unless you have a good reason for not being ready for trial, let's try it.

Mr. Freeland: I am physically and otherwise prepared to try it. That is the issue now, your Honor.

The Court: Then if the other indictments come down before the trial, maybe you can renew your suggestions.

Mr. Freeland: I am certain they will come down at an appropriate time.

Thank you.

The Court: All right.

REPORTER'S CERTIFICATION.

I hereby certify that the foregoing is a true and complete excerpt of proceedings held in connection with the aforementioned action on April 6, 1971, before the Honorable Edward Dumbauld, District Judge.

MARVIN D. CUTRIGHT,
Official Reporter,
1029 Post Office Building,
Pittsburgh, Pa. 15219.

APPENDIX "I"

Excerpts of Transcript of Testimony

* * *

AFTERNOON SESSION

The Court: Do you care to open for the Government?

Mr. Scarlata: Yes, your Honor.

May we approach the Bench for a moment before that?

The Court: Yes.

(At Side Bar.)

Mr. Scarlata: I think at this point the issue is more ripe than it was this morning. I intend to prove in my case, and also to refer in my opening to the underlying circumstances that led the Agent to the house of Robert Brown, and also to prove the recovery of heroin the next morning during the search. I do that on the theory it tends to prove his motive when he shot the Agent. It is proof in my direct case. I want to bring that to the Court's attention prior to making those statements in Court.

The Court: You know what your case is and what you can do. I don't know.

Mr. Scarlata: Fine.

The Court: Don't overstep the bounds.

* * *

EXCERPT FROM OPENING STATEMENT OF ASSISTANT UNITED STATES ATTORNEY SCARLATA.

• • •

Again, in any criminal case the indictment must be based upon some law. I am sure you won't be surprised to learn that Congress has enacted a law to protect Federal Agents. The law prohibits the assaulting, resisting, opposing, impeding, intimidating and interfering with any Federal officer while he is in the performance of his official duties. In this particular case the Federal officers who we are dealing with are agents of the Bureau of Narcotics and Dangerous Drugs. The indictment in this case charges on or about the 12th day of February, 1971, in the Western District of Pennsylvania, Robert Howard Brown willfully and by means and use of a dangerous weapon, that is, a 30 caliber rifle, did forcibly assault, resist, oppose, impede, intimidate and interfere with Burton E. Lund, Donald L. Ashton and John M. Guseman, officers of the Bureau of Narcotics and Dangerous Drugs, of the United States Department of Justice, while the said officers were engaged in the performance of their official duties.

• • •

Now in terms of this particular offense, the Government must prove that the officers who were assaulted and who Mr. Brown resisted, et cetera, were officers of the Bureau of Narcotics and Dangerous Drugs. The particular law under which this indictment is drawn, sets out another section of the Code, which designates the various agencies and various officers who are covered by this law. One agency that is covered by the law is the Bureau of Narcotics and Dangerous Drugs.

Well, the law dictates these individuals are covered by the law and then we must prove that they are, in fact, employees, an agent of the Bureau of Narcotics and Dangerous Drugs. We must next prove that these officers at the time these events occurred, were acting in the performance of their duties; that is, that they weren't engaged in some frolic of their own; that they were there on business is the best way to put it.

* * *

Let me now turn to the development of the facts that the Government will adduce during the course of this trial. The facts in this case are relatively simple, but I implore you not to think that because the facts are simple, the case is not a serious one. It is a very serious one. This is a case where an agent of the Bureau of Narcotics and Dangerous Drugs was shot. Not only did the Defendant interfere and impede and attempt to intimidate him, he shot him.

Now the way this all came about was that the agents, while they were working, received some information from an individual whom they believed to be reliable informant. Along with this information, and linked with some independent investigation of their own, they determined that this Defendant, Robert Howard Brown, was about to receive or had received a shipment of heroin on the evening of February 11, 1971.

They also learned that the Defendant's wife was to make a delivery of some of this heroin that evening. They set up surveillance near the house of the Browns, followed Joann Brown—that is Mrs. Brown—from the house toward her destination to make this particular sale. Before she arrived at her destination, they stopped the vehicle, placed Mrs. Brown under arrest and recovered two large jars of a

white powder, which they at that time honestly believed to be heroin. Subsequent analysis of the powder has proved them to be wrong, but at that point they were acting in good faith, believing it was heroin. In fact, it turned out to be milk sugar, a dilutant that is used with heroin.

After placing Mrs. Brown under arrest, they then determined they should arrest Mr. Brown. They proceeded to the vicinity of Mr. Brown's house and in an attempt to effect the most peaceful arrest that they could, they formulated two plans on how they would effect his arrest. The first plan was to have Agent Burton Lund of the Bureau of Narcotics and Dangerous Drugs, drive his car up near the house of Mr. Brown and pretend the car had broken down. Agent Lund did, in fact, do that. He drove his car near the house, stopped the automobile, got out of the car, opened up the hood, and did something to the motor, then got back into the car and tried to start it. Not being able to start it, he then proceeded up to Mr. Brown's porch and knocked on the door. He received no answer. At the same time he was doing this, Agent Ashton and Agent John Guseman had proceeded to the corner of the Brown residence, where they were maintaining surveillance and awaiting further developments.

Agent Lund received no response when he knocked on the door, so he proceeded back to the original meeting place, which was at least far enough away from the Brown house that they could not be observed.

Again, as I mentioned, the agents were interested in affecting a peaceful arrest. They had almost simultaneously with initiating their first plan come up with another plan involving Chief John Salopek, the Chief of Police of White Oak, which is where this residence is located.

The reason they decided to call upon Chief Salopek is that they believed Chief Salopek knew Mr. Brown and it was their feeling the Chief could go knock on the door and talk to Mr. Brown and they could then arrest him. Chief Salopek arrived after Mr. Lund had gone back to the original meeting place. He was told of what was happening. He then proceeded to go to the Brown residence himself.

In the meantime, Agent Lund joined Agent Ashton and Guseman around the side of the house. These agents observed Chief Salopek drive up to the house, get out of his car and go and knock on the door. The Chief knocked once, maybe twice. There was a response from someone upstairs in the house. The effect of the response was something like, "Who is it?", or "What do you want?"

Again, I don't presume to quote things to you verbatim, but to give you the understanding of what occurred.

Anyhow, this individual opened up the window and said, "What do you want?", or "Who is it?"

Chief Salopek backed off the porch and said, "I am Chief Salopek with the White Oak Police", and he had a little more discussion with this individual. The individual closed the window and the Chief went back to the porch.

Ultimately Mr. Howard Brown came to the door. The Chief entered the house, displayed his credentials to Mr. Brown and told Mr. Brown that the house was surrounded by Federal Narcotic Agents who wanted to talk to him and would he please come out and talk to them. Mr. Brown then pulled from behind his back a 30 caliber rifle, which he pointed at the Chief and told him to get out, or, again, words to that effect?

The agents, having realized that the Chief had gained entry to the house, had at this point begun to come around the house and attempt to get up on the porch. I am not sure this is the chronology, but when the Chief saw the gun, he grabbed it with his left hand and started to push it away. He was backing out of the house and the agents were coming up the steps and the Chief said, "Watch it. He has got a gun."

The agents started to scream, "Police, drop the gun. Federal Agents, drop the gun", and words to this effect.

A struggle ensued between the Chief and Mr. Brown with the agents attempting at various times to gain entry to the house or to help him open the door. Ultimately Police Chief Salopek lost his grip on the gun. The agents realized this and the three agents and Chief Salopek began to move away from the door. Agent Ashton went to the left side of the door. Agent Guseman went to the right side of the door. Agent Lund, who was behind the Chief, sort of stepped back. The Chief stepped back and the door kind of closed and reopened. When the door reopened Mr. Brown shot Agent Burton Lund. The agents and the Chief then left the porch, for obvious reasons. Mr. Brown then locked himself in the house. Agent Ashton went to the aid of Agent Lund, who had gone over the side of the rail to the left side of the house, if one were facing it. Agent Ashton pulled Agent Lund to the far left side of the house and attempted to administer some first aid to him. The other agents took up various positions around the house to assure nobody got in and nobody got out. Mr. Brown remained in the house for roughly 30 minutes. During this period Agent Ashton observed or overheard water running in the house. About a half an hour later, Mr. Brown came to the

door, threw the rifle out and surrendered. He was then arrested and taken into custody. Agent Lund was taken to the hospital and the agents secured the house; that is, they did not search the house except to look for any other individuals in the house, but they secured it to make sure no one else was there and no one else got in there or no one else entered the house. They remained there overnight and the following morning returned with a search warrant.

In executing their search warrant, and based on the information they had from Agent Ashton, who had heard water running during this half-hour period, they took apart some of the drain pipes in the house and found in some of the drain pipes a white powdery residue which they then forwarded on to their laboratory. That material has been analyzed and found to be heroin. I say this about the heroin, because it is the Government's theory that it proves the motive of Mr. Brown, his motive in shooting Agent Lund was to gain time to destroy the heroin. He spent roughly a half an hour in the house. There were traces found of heroin in other places, but by and large there was heroin found in the drain traps.

That is, in substance, a brief outline of what the Government will prove.

* * *

(At Side Bar.)

Mr. Freeland: As I informed this Court this morning, it is not my practice to interrupt counsel in an opening statement to a Jury. Lest I have erred, it is on the side of caution that my error has been made. Mr. Scarlata has referred to the issuance of a search warrant on February 12 and a search of the premises which revealed that which was suspected to be heroin and that which by analysis was heroin, all of which introduces the element of a crime under

the United States Law for which the Defendant is not presently under indictment, nor on trial before this Jury. In view of the fact that the possession of a narcotic drug, particularly the drug heroin, is considered one of the more heinous crimes by the public of the United States, our newspapers are filled not only with information about deaths resulting from the use or misuse of heroin, but even how our foreign affairs, our relations are affected by the drug. I point specifically to recent articles and editorials on the matter between the United States and Turkey and the poppy farms in Turkey. In view of all of these facts, which would make it clear to any Juror, the offense, possession of heroin, no matter how couched in terms, whether it be a violation of the tax statute or a violation of some other statute, such reprehensible matter to have even been alluded to in the opening, is so highly prejudicial to the Defendant that the Jury should be instructed to disregard it and the Government Attorney should be directed to introduce no evidence in support of his assertions. I do not at this time ask for the withdrawal of a Juror in declaration of a mistrial. It is a practical consideration. I was compelled, because of my physical condition last week, to ask for a mistrial at the beginning of the trial and I am interested in having this matter fairly tried eventually.

The law, furthermore, is clear that convictions may be had in Criminal Courts in this particular district, or anywhere in the United States, with no evidence as to motive. Motive may be of interest in mystery stories, but as I understand the law of the United States, motive, *per se*, is not an essential element of any trial. Therefore, to allow the United States Attorney to introduce evidence of a crime of which the Defendant is not charged and not on trial, merely to show motive *inter alia* is to permit him to go beyond the bounds of propriety.

Mr. Scarlata: I told the Jury it was to show his motive. That is the truth. In addition, though, to showing motive, I think from a legal point of view, which I wouldn't tell the Jury, that evidence is offered to show his intent and his knowledge, to show his motive, which I am permitted to prove, although I don't have to prove it. I would suggest it could even be construed as being a part of the *res gestae* that the shooting occurred to permit the Defendant to go and destroy the heroin.

I will concede that the general rule is that proof of other crimes are usually excluded, but when the proof of other crimes are so inter-related with the crime for which the Defendant is on trial, and to show either his motive or his intent and knowledge, the exclusionary rule offers those exceptions, which the Government can introduce proof of another crime.

Mr. Freeland: I would point out, your Honor, as to intent, in addition to those matters which are already set forth, but as to intent, Mr. Scarlata has raised this as a basis, again, *scienter* is not a matter concerned with in Section 111 of Title 18 that need be proved by the Government in this case. Unless we have the gratuitous introduction of intent when it is not necessary.

The Court: What do you mean *scienter?*

Mr. Scarlata: We don't have to prove, your Honor, he knew they were Federal Agents.

The Court: What do you mean by *scienter?*

Mr. Freeland: He knew that he had a criminal mind and knew these individuals as Federal Agents. He had a criminal mind or intent at that time of the shot, which comprehended their being Federal Agents and that his act was contrary to the law. As I understand it, even if he did not know they were Federal Agents, he could be found guilty of this. In other words, his knowledge need not be so

great—I am not saying how great it has to be, but it need not be so great, as I understand it, that they be Federal Agents or that he knew they were Federal Agents.

The Court: If you can prove the Defendant knew they were Federal Agents, he makes out a stronger case.

Mr. Freeland: Granted.

The Court: His case would be somewhat weak, if he did not.

Mr. Freeland: I think we must balance the harm to the Defendant by the introduction of this against the harm to the Government by not allowing it. That is why I point out both motive and *scienter* are not necessary ingredients. If either were necessary, then the harm to the Government might be so great that the Court may find this way: That the harm to the Defendant, though substantial, was outweighed by the need to have the kind of trial in which the Jury would have all the facts. But I think when we come on tangential matters, such as we have here, the balance seems to be in favor of the Defendant. I would point out further that Mr. Scarlata has asserted that this was I suppose—*res gestae*, I think, was his language—support that the possession of the heroin was contemporaneous with the shooting of the officer. The fact is that the Government could have closed its opening without discussing what was found thereafter, since the Government had, without objection, laid the basis for the agents to be there. I think this was an unnecessary delving into that which was established only the next morning on the execution of the search warrant.

Mr. Scarlata: It was found the next morning. It was, nevertheless, there the evening before, at the time that the shooting occurred. In keeping with the law, the agents did not search the house until they got a warrant.

The Court: Do you have any authority on this point?

Mr. Freeland: There are a number of cases, your Honor, where the general rule and the exception—I have a number of cases—I don't have them with me. Frankly, last week I argued the same matter and I picked up my briefcase this morning for the first time since last week and I thought the matter had been determined. I think that crucial to it would be the exceptions which have been allowed, exceptions on this particular fact situation where Mr. Scarlata has pointed out to me, at least, and to Judge Dumbauld, United States versus Ferrone, a Third Circuit Case, a copy of which I have.

The Court: Do you have the citation?

Mr. Freeland: I think it is unreported.

Mr. Scarlata: It has not been bound yet. I can give it to you. It is an Opinion filed February 17, 1971 at No. 18777, it being an Appeal from this district to the Third Circuit. An Opinion by Judge Rosen.

Mr. Freeland: I bring this case to the Court's attention for two reasons. I am sure Mr. Scarlata would, if I didn't, and I think the most crucial thing in the case we presently have is the nature of the other crimes revealed by the Government, because prejudice is not a vacuum kind of thing, but more likely that there is to be prejudice, the greater should be the restrictions on the Government. In the Ferrone Case, I must point out the Court allowed information about gambling for which the Defendant could not have been indicted because of the Marchetti Decision.

Mr. Scarlata: The Defendant had been indicted under the old Gambling Tax Act, I believe, and the indictment was dismissed as to those counts on the Marchetti—Grosso Decision.

Mr. Freeland: There was resistance at the home of the Defendant, the apartment of the Defendant Ferrone. I think the fact that the Court's decision is generally ex

cathedral on the issue of other crimes would point out to this Court that there is a great deal of difference between this recent decision of the Circuit and the instant case.

The Court: Well, you want me to instruct the Jury to disregard counsel's opening and direct the prosecutor to introduce no evidence in support thereof?

Mr. Freeland: Correct.

The Court: Motion denied.

(In Open Court.)

Mr. Scarlata: May I proceed, your Honor?

The Court: Yes.

Mr. Scarlata: Agent Ashton, please.

* * *

APPENDIX "J"

Closing Statement of Assistant United States Attorney Scarlata

Mr. Scarlata: May it please the Court, Mr. Freeland, ladies and gentlemen.

I am afraid I am at somewhat of a disadvantage following Mr. Freeland, who is an excellent speaker and also somewhat more colorful than I am. I don't have my notes written on a napkin. I have them written on some sterile, yellow paper, and I begin with that, because in listening to Mr. Freeland's closing it occurred to me that what Mr. Freeland was trying to do was to put the events of the evening and morning of the 11th and 12th of February into somewhat of a sterile atmosphere, into a vacuum. I thought that the best way I can begin my closing to you would be to attempt to put this case back into its proper

perspective. The events that occurred on that evening did not occur in a vacuum. They did not occur in a sterile atmosphere. They occurred amid a great deal of excitement, concern, a great deal of anxiety on the agents. These men in the performance of their duties, and in attempting to effect a peaceful arrest, were forced to formulate certain plans because they wanted to do this peacefully, because they wanted to avoid violence.

When Agent Lund went to Mr. Brown's door after he had feigned his broken down car, he was not going to a cocktail party at his neighbor's house. He was under a great deal of stress and tension. When Chief Salopek went to that door he was not going to a party either. The door at 206 Coolsprings Road is not on trial in this case. The doorbell is not on trial in this case. Whether or not the agents rang the bell or knocked on the door doesn't really make a lot of difference. What is significant is did this Defendant who is on trial in this case, Robert Howard Brown, did he assault, oppose, interfere with, intimidate and resist Burton Lund, Donald Ashton and John Guseman while they were engaged in the official performance of their duties. That is the crux of this case, not who rang what bell, not where was the storm door, not how skillful a cross examiner Mr. Freeland is to get Mr. Guseman confused on the witness stand. The question that you have to decide is did this Defendant assault, oppose, resist, interfere with or impede these agents in the performance of their duties and you don't have to answer affirmatively to all of those various actions. You only have to answer affirmatively to one. You don't have to determine whether Mr. Brown knew that these Federal Agents were, in fact, Federal Agents. The law doesn't require us to prove that.

Now, Mr. Brown's defense brings up the idea that he did not know who they were. Well, I will gamble. I will take the gamble that Mr. Freeland was unwilling to take. If you believe that, you acquit him. But if you acquit him, you are going to do a great disservice to us all. Not only was Mr. Brown told who they were by Chief Salopek, by Agent Lund, by Agent Guseman, Mr. Brown could have surmised who they were.

This is the reason we were permitted, and did prove that Mr. Brown possessed heroin in that house. Mr. Freeland said, "I wouldn't ask the question of how you would react to Chief Salopek coming to your house at 12:30 in the morning or 1:00 o'clock in the morning."

That is very fair of him. He has no right to ask you that question, because there is no comparison between you and Robert Howard Brown. You would not have heroin in your house at 12:00 o'clock in the morning. You would have no reason to be concerned about Chief Salopek coming to your door. Robert Howard Brown had a lot of reason to be concerned about a police officer coming to his door and Robert Howard Brown had a lot of reason to suspect that Federal Agents might be looking for him.

And then Chief Salopek confirmed that. Now why didn't Brown resist Chief Salopek initially? I can't answer that question. I will do what Mr. Freeland did and I will take a couple of guesses. There are a number of explanations to that that run from a belief that he could deceive Chief Salopek all the way, to the possibility that he would kill him. Anything between those two extremes is possible. Remember, when Chief Salopek entered that house, he was alone. No one else was around the house, as far as the occupant of the house would know. Mr. Brown could have

come down and talked to the Chief and had he lied or appeased him, satisfy any questions he had. He could have done any number of things. And it was only when he was told that there were Federal Agents outside, Federal Narcotics Agents, that he pulled the gun from behind his back. And he did that, ladies and gentlemen, so that he would have an opportunity to get rid of his heroin. It was only after the Chief informed him of the presence of the Federal Narcotics Agents that he reacted. There is some truth to the old mystic belief that you don't fool with the Feds. He, at that point, realized that he wasn't going to con Chief Salopek and he wasn't going to be able to get away from Chief Salopek, but that he was faced with the presence of a number of Federal Narcotics officers who, not unlike Elliott Ness, get their man.

Did Brown do what was reasonable? I have to answer that question twice. I suppose for a heroin trafficker, perhaps he did do what was reasonable. For a citizen, no, he didn't do what was reasonable.

And the question of reasonableness is not so much the reasonableness of his act as the reasonableness of his belief.

Can you conceive that he didn't know what he was doing?

It is possible that a lot of things could be said about Robert Howard Brown, but I doubt that anybody could accuse him of being dumb. I realize it is quite difficult, but try and imagine yourself as traffickers in heroin. Think of how you would react to finding out that the show was over, that this is it, I am caught virtually with my pants down. Think of the reasonableness of the alibi that Brown wants you to believe that he was being robbed. And think of that from the perspective or the point of view of one who it has been proved in this Court possessed heroin.

How do you react to learning that there are Federal Narcotics Agents present? Even before you learn that, don't you have to be always on your guard? Don't you have to be concerned about getting caught? Don't you have to expect that Federal Narcotics Agents might be coming to your home? Isn't that an ever present fear of anyone who is violating the law, of anyone who risks getting caught as he did?

I suggest to you that if Chief Salopek said nothing to Robert Howard Brown about who was outside, if the agents said nothing about who they were, this Defendant acted unreasonably in shooting. There is absolutely no reasonable basis in the world for his believing he was being robbed. There is an abundance of reasonable basis for his believing that he was about to be arrested. And I say that even without the announcement of who was there, and we then link that with the announcements that were made, and not only did he have reasonable cause to believe that these men were Federal Narcotics Agents, he knew they were. And that is why he did what he did.

Mr. Freeland has said much about the weakness in the Government's case. Well, I suggest to you, ladies and gentlemen, that even in his closing argument he pointed to no weaknesses in the Government's case. He pointed, certainly to some minor contradictions. He pointed to primarily his defense, more than anything else, but to no weaknesses in the Government case. And I will challenge you to look at the Government's case and analyze it and I am sure you will find no holes in it.

If you approach it as the Judge tells you to approach it, if you listen to what the Judge tells you about the law, you will see absolutely no holes in the Government's case.

Some of the things that Mr. Freeland has called to your attention are the ability of the agents to have seen the other agents and to have seen either Mr. Lund or Chief Salopek knocking on the door. Again, we get back to the question is that doorbell on trial or is Robert Howard Brown on trial. They knocked on the door. Agent Guseman said he saw them knock on the door. Agent Ashton also said he saw them knock on the door. What part of the door they knocked on isn't terribly important. Did they knock on the right or to the middle or to the right of the left-hand storm door, the middle part of the door? These are some collateral circumstances that should be called to your attention so that you can assess the credibility of the witnesses, but in the final analysis of did Robert Howard Brown commit the crime for which he is charged, they don't really make a lot of difference.

Mr. Freeland has at least implied, if not gone a little further than that, that the reason the agent told this "story" about knocking on the door was because they needed corroboration for one another.

Let me throw the why back at you. Why did they need corroboration? There is no particular significance to the knock on the door. They don't have to corroborate one another about that point. How Chief Salopek gained entry, be it through kicking in the door—kicking in the door would make a difference, perhaps, but whether he knocked, whether he just stood on the porch and called to Mr. Brown, it doesn't make any difference. The critical question in this case is did Mr. Brown do the action for which he is charged.

And if you believe that Agent Lund, Agent Ashton and Agent Guseman took the stand under oath and lied to you,

then you acquit Mr. Brown. But they didn't lie to you, ladies and gentlemen. They made mistakes, as we all do. There might be some minor contradiction in their testimony, but I suggest there probably will be minor contradictions in your recollection of their testimony, because no two of us see an event precisely the same. No two of us remember an event in precisely the same manner. But if you scrutinize their testimony carefully and closely, their testimony is almost identical on the crucial elements in this case, even with the confusion that Mr. Freeland managed to create when Agent Guseman was on the stand. I don't say—I am not criticizing Mr. Freeland for doing that. That is his job. That is a part of his job. But he is a skilled defense attorney who has many years of practice, who is sitting at a table and who has had innumerable opportunities to cross examine people. John Guseman is an agent with the Bureau of Narcotics for 18 months, unskilled in the ways of the Courtroom. Most competent attorneys probably could confuse John Guseman. But even with the confusion that he created, he created no confusion about the events at the door. He confused him on what he did around the side of the house, which doesn't really matter. When I reviewed my notes, I found few, if any, questions asked Mr. Guseman about what happened at the door. Even with the confusion, his story is still consistent with the stories, the testimony of the other two agents and Chief Salopek.

Mr. Freeland has also told you in his closing that what we must prove is that Robert Howard Brown shot Burton Lund. We proved that. But we didn't have to prove that. Mr. Freeland told you that it was crucial to the Government's case that the front door close and reopen. That is not so. The crime of assault, resisting, opposing, impeding and interfering with a Federal officer in the performance of

his duty was completed before Burton Lund was shot. It was over with. If Mr. Lund had not been shot—and it is certainly unfortunate that he was—we still could be in this Courtroom prosecuting Mr. Brown for assaulting, resisting, opposing, interfering with, impeding these agents. The crime was completed before the shot was fired, or the crime could have been. The shooting is in the law a battery. We have all, I am sure, heard of assault and battery. They usually go together. The assault precedes the battery. The Judge will tell you what an assault is. But implicit in a battery is an assault. These men were assaulted long before, in terms of a minute period of time, within the 30 or 40 seconds or so interval, they were assaulted before Agent Lund was shot. It is not crucial that the door opened and closed.

It is not crucial to the Government's case that Chief Salopek had released his grip on the gun. It is, in fact, what happened. It is a fact that the Chief released his grip on the gun, stepped away from the door and that then Robert Howard Brown fired the shot that struck Burton Lund. That is something that you can legitimately take into consideration. But the crime could have been over prior to that. Without the shooting, we could still be here.

What does willfully mean? The Judge will tell you what willfully means. It doesn't mean—let me approach it from this aspect: It means the doing of an act knowing that you are doing the act. Mr. Brown, knowing that there were Federal Agents on the porch, resisted them. The crime is completed. It is over. In the abstract, the crime is completed. We have more than that. We have a great deal more than that that imputes more knowledge to Mr. Brown, more willfullness, more motive, more intent. Mr. Brown, with this knowledge willfully not only opposed,

resisted and all the other words that are used in this particular law, he shot Agent Burton Lund and he did it willfully. The gun didn't discharge accidentally. That is the doing of an act.

Now you have been asked why was the shot at a three foot level. If you will think about Agent Ashton's testimony, he said about three feet. Now, what is about three feet? Somewhere between four feet and maybe two feet. How could that shot have been fired at that level? Why would Mr. Brown have been shooting downward? There is no testimony in the record he was shooting downward. He may have been shooting upward. Agent Ashton testified as to the approximate height of the flash. When a gun discharges, a flash goes out and goes to all angles, up, down and all angles. He saw the flash at about three feet. If you think about the testimony, Mr. Brown had the gun kind of in this manner, and had his shoulder to the door. The Chief moved back from the door and he also—this Chief also told you he was down on his hands and knees, so the gun was way down. Mr. Brown was at least in a crouched position pushing to the door. The Chief stepped away and the door kind of closed or closed. He opened the door and came up and fired. This is the explanation of why the bullet was fired at the angle it was fired. That is why it hit Burton Lund in the leg, rather than in the heart.

Then he closed the door. And what did he do when he closed the door? He went into his house very calmly, very calmly, and he began to get rid of his heroin. I don't know precisely how he went about doing this, whether he placed the call first or whether he placed the call after, but he then made a call to the police department.

Now if you believe the theory of the Government's case that he knew exactly what he was doing, this man then

began to create an alibi for himself. He knew he had shot a Federal Agent. He knew he had to do something about that. He shot a Federal Agent to avoid being arrested for possession of heroin. After the shot was fired, he retreated into his house and took care of the heroin, at least so he thought. So that crime was taken care of. He doesn't have to worry about that anymore. Now he has got to worry about being arrested for shooting a Federal Agent. So he calls the Police Department.

The significance of this morning's stipulation is primarily that the call for the ambulance preceded Mr. Brown's call for help because he was being robbed. That has been proved that the call for the ambulance went out from the police station at 12:31 A. M. Now, if you will think about Chief Salopek's testimony, he said that the shot was fired, everybody scattered off the porch. They then, the Chief then went to get an ambulance. He got in a car, drove back to the original meeting place or the vicinity of the original meeting place in an apartment complex, went to two or three different apartments knocking on the door, finally got a phone and called the McKeesport Police Department and asked for an ambulance and help. That means that the shooting occurred, conservatively, at least five minutes before 12:31. Perhaps it was even earlier than that, which gives Mr. Brown more than adequate time to take care of his heroin and to begin to think about creating an alibi for this crime.

Now Mr. Freeland has alluded to the time that this stipulation was made and the method in which it came in and I kind of got the impression that he was suggesting that I had been withholding something from you. That is not the truth at all. Until Mr. Freeland put his defense on on behalf of Mr. Brown, I didn't know what his defense

was going to be until Mr. Brown said at 12:33 I called the police station, I didn't know that happened, so the call to the ambulance has no significance to this case. But once he says that, the time factors do become important. That is when I dug out the log of the McKeesport Police and that is when I called Officer Hallinsinski and asked him what happened. I accepted what he told me, and rather than require him to come in here I told Mr. Freeland that is what Mr. Hallinsinski would say, if he came in, that he got these calls at this time; that he got the call for the ambulance at 12:31 and sometime after that he received a call from a Mr. Brown. So rather than keep you longer, and rather than requiring him to come in at the time this information became relevant to this case, we then stipulated to it.

The same thing is true of the magical doorbell that perhaps would have injected a tranquilizer into Brown had it been rung. The doorbell had no significance. I still have three or four additional pictures of the grounds. They add nothing to this case. When Mr. Freeland wanted to bring in testimony about the doorbell, as a gentleman, I hope that is why I did it—I had a picture and I gave it to him, so that you people can better see the situation. But there is no magic or mystic to that doorbell, as I told you before.

Mr. Freeland has also said to you why didn't we bring in any uniformed policemen. I say to you, "What for?"

I will also say why didn't Mr. Freeland bring in some uniformed policemen, if he thinks they are so vital to his case. I have no magical control over the McKeesport Police Department. Those witnesses were equally available to him. He could have brought them in, if he were so interested in what they had to say.

Now in appraising the defense that you have seen, you must look at the reasonableness of the belief that Mr. Brown has asserted that he thought he was being robbed. These are the only circumstances that have been offered in mitigation of the offense. I suggest to you that the Government virtually proved its case absolutely, not only beyond a reasonable doubt, and that your consideration then turns to the reasonableness of the Defendant's assertion that he believed he was being robbed. I feel compelled to go through, again, the reasonableness of that. The testimony of Chief Salopek is that he went to the door and knocked on the door, knocked again. Maybe he didn't knock again. In any event, someone opened a window upstairs. The Chief backed off the porch, looked up at the window. The individual said something about who are you or what do you want. The Chief said, "I am Chief Salopek, the Chief of Police of White Oak. I would like to talk to you.", or some words to that effect.

He did say that he was the Chief of Police of White Oak Borough.

There was some more exchanging of conversation. The Chief went back on the porch. Now not only the Chief, but all the agents have told you there was then a lapse of time, perhaps a minute or so. I am not exactly sure of how long it was. Let me guess what was happening inside the house. Robert Brown's mind had been going to work. The Chief of Police is here. I may be in trouble. I better go get my gun. He went and got his 30 caliber rifle, loaded it, cocked it, came to the door and concealed it behind his back, perhaps still believing he could outwit Chief Salopek, because at this point all he knew was Chief Salopek was on his porch. That is all. Chief Salopek, when the door was opened, took his flashlight, not up in the

air as if he was going to strike Brown with it, but he held it and he said kind of like this (indicating), so Brown could have the opportunity to see his face and to see his credentials. He again said, "I am Chief John Salopek of the White Oak Police Force."

Now you have been asked should Brown believe that. Why shouldn't he? Keep in mind that Brown is not a dumb man. Brown then opens the door. The Chief goes in, again says, "I am Chief Salopek of the White Oak Police Force", again shows his credentials—and you have seen his credentials and there are copies of his credentials that have been admitted into evidence—shows him his credentials that have his picture and says that he is, in fact, a police officer. No reaction from Brown. He doesn't say to get out, burglary. In fact, he lets him in. The Chief then says there are Federal Narcotics Agents outside who want to talk to you. This elicited the reaction from Brown. This comment notified Brown that he was about to be arrested and he was not going to be able to outwit Chief Salopek or overpower him or do whatever he had in mind. This is when Brown pulled the rifle from behind his back. That is when Brown began to fight for his existence. Shortly after the struggle began between the Chief and the Defendant, Mr. Brown, the agents arrived on the porch.

Now let's again take this out of a vacuum and put it in the situation in which it occurred. There is a man with a 30 caliber rifle pointed at the Chief. The Chief is involved in a struggle with him. These agents are there to arrest this man. They were concerned about effecting a peaceful arrest. They come up on that porch after Mr. Brown had brandished this weapon at Chief Salpoek. First the Chief says, "Watch it. He has got a gun.", or something to that effect.

They scream at him, "Drop the gun. Police officers. Drop the gun. Federal officers. Drop the gun."

I suppose someone could argue that Mr. Brown didn't hear that. I suggest to you that that would be incredible. Chief Salopek heard it. They heard one another. He knew who they were, ladies and gentleman. He knew who they were even before the Chief identified them. He never at all believed he was being robbed, but he tried to create an alibi for himself, just like he shot Burton Lund so that he could dispose of the heroin that he had in his house. I would suggest to you that the attempted destruction of the heroin certainly substantiates the Government's case that Mr. Brown not only willfully, but knowingly did what he is charged with doing.

I am going to go one step further and suggest to you that his telephone call to the police department was not exculpatory, was not a good faith telephone call, but is further evidence of the fact that Robert Howard Brown knew what he was doing. He knew that he had shot a Federal Agent and in an attempt to save his own skin he put together an alibi on the spot. That is the reasonable explanation of this defense. That is the reasonable interpretation of what happened, not that he believed his home was being burglarized, not that he believed that he was being robbed, but first, that he had very good reason to suspect that he might be under surveillance, under watch, by Federal Agents; secondly, that he had very good reason to believe he might be arrested by Federal Agents; thirdly, that he knew when Chief Salopek told him that there were Federal Agents outside; fourthly, that this knowledge was reinforced when the agents came up on the porch and yelled, "Federal Agents, drop the gun."

He coolly and calculatingly, after shooting Burton Lund, went back into his house, destroyed the evidence, the heroin evidence, and then set up his alibi. He didn't come out later on because at that time the flashing red light appeared. He came out because he knew he couldn't get away and because he had tended to all his jobs. He had done all he could to save himself at that point. He had destroyed the heroin evidence and he had attempted or he had called the police and begun to put together his alibi, his story for you people, you members of the Jury.

Keep in mind that the concept of the reasonableness of his alleged belief, keep in mind how many times the Chief identified himself, how many times the Chief told him about the Federal Agents and how many times the Federal Agents themselves identified themselves, and keep in mind Mr. Brown's motive to keep these people out of his house. Keep in mind in your deliberations, Mr. Brown's reasons to believe that he would be arrested that night. Keep in mind the fact that he was engaged in another crime.

You have been asked by the defense to disbelieve Chief Salopek and you have been shown so-called impeaching evidence. Now the Judge told you, and perhaps will tell you again, that the recitation of Mr. McGavern's article is not evidence in this case. It is merely offered to impeach the Chief. The evidence in this case is the testimony the Chief gave from the witness stand. Under oath he told you what happened on the early morning of February 12. He told you how he had lost his grip on the gun, how the door closed or partly closed. He told you how the door was then opened and how Brown stepped forward from where he was standing, pulled the trigger and shot Burton Lund. With respect to this impeaching comment of Mr. McGavern's, without impeaching the entire newspaper media, I asked Mr. McGavern yesterday, after he had told

us he was a reporter for 19 years, if he had ever misquoted anybody before and he said, "No."

I suggest to you that that is almost incredible. In 19 years he never made a mistake and never misquoted somebody. There is nothing wrong with making mistakes. You know people are human beings and make mistakes. But he sat there and said in 19 years he never misquoted anyone. Think of the circumstances under which that interview was taken. Think, even if the Chief did give that statement, think of the circumstances under which it was taken. A shooting had just occurred. A man had been severely injured. The police were still going through the house. People were moving back and forth and a lot of things were going on. Think of Mr. McGavern's ability to accurately record what the Chief said and then to accurately transpose it the following morning. It just strikes me as incredible any man, any newspaper reporter—and I respect newspaper reporters, but I think that particular statement is very hard to live with—that he never misquoted anybody. In addition to that, I had him read another portion of his article to you, a portion of which he gleaned in the coolness of a hospital, not with all the police officers around. A portion of his article there, where he had an opportunity to check the hospital records, where he said Agent Ashton sustained an injury to his left hand. Agent Ashton did, in fact, sustain an injury, but it was to his right hand.

There is another mistake in that very article. I am not criticizing Mr. McGavern, but there is a demonstrated mistake in the article and I am suggesting the impeaching nature of his testimony is not as valid as you have been led to believe and I am saying even if the Chief made the comment, he did it under a lot of stress and strain and

Mr. McGavern was under a lot of stress, because he has a deadline to meet too. He told you he was up all night long. I am telling you the Chief's testimony given under oath on this witness stand is what matters in this case.

As I told you before, the question of whether or not the door opened and closed is not that critical to the Government's case. The question is: Did Mr. Brown assault, oppose, impede, intimidate and interfere with these three Federal Agents. That crime in the abstract had been completed before Mr. Brown shot Burton Lund and the shooting is an aggravation of the crime. The shooting further substantiates the knowledge that Mr. Brown had.

What about the rest of the Chief's story? Again, I say to you that Chief Salopek, John Guseman, Donald Ashton and Burton Lund told you substantially the same story. They told you of their concern. They told you of the Lund ruse with the automobile. They told you of how Burton Lund joined Ashton and Guseman at the side of the house. They told you how Chief Salopek went up on the porch, how he went back off the porch, how he talked to somebody, how he gained entrance to the house, how they then started up on the porch, how the Chief screamed, "Watch it. He has got a gun.", how a struggle ensued, how the door was closed on the Chief's arm, how the Chief said or how they realized in some manner he was losing his grip on the gun, how they backed away from the door, Agent Ashton going to the left side and Agent Guseman going to the right side of the door, how simultaneously with Agent Ashton's breaking the glass on the left-hand storm door Brown reopened the door and shot Burton Lund. That is corroboration for Chief Salopek and for one another.

Those are the critical elements, the events that occurred on that porch, the resistance of Mr. Brown, knowing who

he was resisting, the assault by Mr. Brown, knowing who he assaulted, the opposing by Mr. Brown, knowing who he was opposing. And I could complete the list with the other various elements or alternative elements to this crime. I suggest to you that under any one of these alternative parts of this crime Mr. Brown is guilty.

In my opening I talked briefly with you about being peers, being the peers of both the Defendant, Mr. Brown, and being peers to other people in the community. As I summarize and finalize my closing, I would like to reflect upon that a little bit more. I told you you had a two-fold obligation; that you had an obligation to Mr. Brown to be objective, but you also had an obligation to the people who comprise the Government. In the final analysis, you people are the Government. You elect the lawmakers. You elect our congressmen and senators. They, in accordance with your desires, enact the legislation. You elect the executive branch, the president, and he has various branches, one of which is the Bureau of Narcotics and Dangerous Drugs. Those people are empowered with enforcing the laws that Congress enacted at your request to protect you.

Finally, you sit as Jurors in the ultimate enforcement of these laws and you owe a duty not only to Mr. Brown to be objective, but to the people. You have heard of the system. Well, the system has turned full circle now. Your election of your congressman and senators is right back in your laps. It is your Government. The system places the burden back in your laps and you owe a duty to the people of this country and, in particular, ladies and gentlemen, you owe a duty to Agent Burton Lund, who sits in the back of that Courtroom on crutches as a result of what happened in this case.

I frequently tell Jurors that of our various roles in a trial I don't envy them theirs. I envy you yours.

Let me close with a quotation that has been attributed to Oliver Wendell Holmes, one of our greatest Jurists. The quotation is this Jurist says that Government wins in a trial of a lawsuit any time that justice is done. I think that is a terribly profound statement, because justice is done when a Jury acquits an innocent man and justice is done when a Jury convicts a guilty man and it is my job to attempt to achieve justice and in the face of that admonition from Oliver Wendell Holmes, one in which I truly believe, I ask, in fact, I implore you, to convict Robert Howard Brown as he is charged.

* * *

Thank you.

APPENDIX "K"

Affidavit for Search Warrant

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Commissioner's Docket No. .....
Case No. 21045.

UNITED STATES OF AMERICA,

vs.

A tri-level brick and frame single family dwelling located at 206 Cool Springs Road, White Oak, Pennsylvania.

Before: Alexander L. McNaugher, Pittsburgh, Pennsylvania.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as the single family dwelling located at 206 Cool Springs Road, White Oak, Pennsylvania in the Western District of Pennsylvania, there is now being concealed certain property, namely diacetylmorphine heroin hydrochloride, commonly known as heroin, and various diluting and packaging materials such as Lactose, more commonly known as milk sugar, and Manita, more commonly known as Mannite; additionally, there are glassine envelopes, scotch tape and other narcotics paraphernalia and contraband which are fit and intended for use in violation of Sections 4704(a) and 4705(a), Title 26, United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

See attached affidavit.

DONALD L. ASHTON,
Signature of Affiant.
Special Agent,
Official Title, if any.
Bureau of Narcotics & Dang. Drugs,

Sworn to before me, and subscribed in my presence, February 12, 1971.

ALEXANDER L. McNAUGHER,
United States Commissioner.

ATTACHMENT TO AFFIDAVIT FOR FEDERAL SEARCH WARRANT.

On February 11, 1971, at approximately 10:45 p. m., SD210002, an informant under the supervision of BNDD Special Agents received a call from an individual identified by the informant as Robert Howard Brown, whose telephone number the informant gave as 673-6828. Brown advised the informant that his wife (Brown's) would deliver "two pieces" to the informant at the Dennis Restaurant located in Forest Hills on Route 30 approximately 20 minutes from the time of the call. This phone conversation was monitored with the permission of SD210002 by Special Agent Donald L. Ashton.

A subsequent check of the telephone number 673-6828 by Bell Security revealed the above number was listed to Brown's residence at 206 Cool Springs Street, White Oak, Pa. The informant advised that "two pieces" meant

approximately 8-9 ounces of heroin out of approximately $40,000 worth than Brown had told the informant he had currently in his possession.

At approximately 11:25 p. m. a surveillance team observed a late model red Cougar bearing Pennsylvania Registration number 61R286 listed to Joanne Brown (Robert Howard Brown's wife) at 206 Cool Springs Street, White Oak, Pa., exit the garage of the residence of Brown (206 Cool Springs Street, White Oak, Pa.) and proceed toward the Dennis Restaurant.

The vehicle contained two occupants at this time, while enroute to the meeting place, the vehicle stopped for gas at an Arco Station located on Route 48 and State Street. At this time one of the occupants was observed to exit the vehicle and disappeared from view. After getting gas the vehicle proceed again in the direction of the delivery point containing only one occupant later identified as Brown's wife Joanne.

As the vehicle stopped for a red light at the intersection of Routes 30 and 148, Agents Guseman, Ashton, Lund and D'Addio stopped the vehicle and arrested Joanne Brown the driver. Found on the floor of the back seat of the previously mentioned vehicle were two amber colored jars containing white powder believed to be heroin.

Subsequent to the finding of the above, SD210002 made another phone call to the Brown residence telephone number 673-6828. The phone was answered by Brown and SD210002 asked him why his wife had not arrived at the meeting place. SD210002 also advised Brown that SD210002 had left the meeting place as Brown's wife had not arrived. Brown then advised SD210002 to return to the meeting place as his wife would be arriving there soon. The informant agreed and hung up.

Following this conversation, the informant advised the agents that Brown's normal procedure was to have his wife call him within 10 minutes after any delivery and advise him that the delivery had gone according to plan. The informant also advised the agents that if Brown didn't receive a call within 10 minutes after his wife made a delivery his procedure was to destroy all narcotics and leave the area. Based on this information the agents proceeded to Brown's residence to effect his arrest.

Agents D'Addio, Guseman, Ashton, Lund and Maffett (who had joined the surveilling teams) proceeded to the vicinity of Brown's residence. Chief Salopek of the White Oak Police Department who is known to Brown accompanied agents. At approximately 12:10 a. m., February 12, 1971, Police Chief Salopek knocked at the door of Brown's residence. Brown opened the upstairs window and asked who it was. Chief Salopek advised Brown it was "Police Chief Salopek" and that he wanted to talk to Brown. Brown came to the door and let Chief Salopek inside the residence where Chief Salopek displayed his credentials and attempted to place Brown under arrest. At this time Brown displayed a rifle which he had hidden behind him and ordered Police Chief Salopek to leave. As he did this he pointed the weapon at Chief Salopek and forced him partially out the door.

Simultaneously Special Agents Guseman, Lund, Ashton rushed to Chief Salopek, identified themselves to Brown and then attempted to force entry. At this time Brown fired his weapon striking Special Agent Lund, in the leg.

DONALD L. ASHTON.

APPENDIX "L"

Excerpt of Cross Examination of Government Witness D'Addio, Special Agent, Bureau Narcotics and Dangerous Drugs.

* * *

Q. You confiscated the two jars in Joann Brown's car?

A. Yes, sir, I did.

Q. What did you do with them?

A. I locked them in—I placed them in a briefcase and I locked the briefcase in the trunk of the vehicle I was driving.

Q. Was that when you were on the highway?

A. That was after we had affected the arrest of Joann Brown.

Q. Did you open the jars?

A. No, sir, I did not.

Q. When did you first open them?

A. Those jars were first opened, I believe, the following Tuesday.

Q. The following Tuesday? That would be like the 16th of February.

A. Yes. That was a holiday weekend.

Q. Yes, Washington's Birthday is now the 15th.
This was Lincoln's Birthday, the 12th?

A. Right.

Q. Saturday, the 13th, and the 14th was Valentine's Day and the 15th was the official celebration of George Washington's Birthday and it would be the 16th of February these jars were opened?

A. That was a Tuesday?

Q. It is a Tuesday.

A. Yes, sir.

Q. Did you do a field test on them then?

A. Yes, sir.

Q. You didn't do a field test before?

A. No, sir, I didn't.

Q. Were they also late on the 11th and early on the 12th and on the 16th in your custody?

A. In my custody or locked up in a safe in our office.

Q. How could you tell it was white powder?

A. We could see that through the jars.

Q. Could it have been a tan powder?

A. The jars were tan, but the jar wasn't opaque. You could see it was white.

Q. You could see what?

A. You could see that it was white through the jars.

Q. What is the field test for heroin?

A. Why it is the marquis re-agent.

Q. How do you do it?

A. Well, the marquis re-agent comes in a thin glass tube. I believe it is a weak solution of hydrochloric acid or sulfuric acid. You permit the solution to drain to one end of the tube and then you can snap this tube in half. To run the test you try to get a portion of the substance you want to test and place it inside this solution and if you get a positive reaction, what we call a positive reaction, the solution will turn a purplish color.

Q. Why do you call it a field test?

Mr. Scarlata: I fail to see the relevancy of this and it is outside the scope of the direct examination, even the widest scope of the direct examination.

The Court: Do you object to it?

Mr. Scarlata: I do.

The Court: Sustained.

Mr. Freeland: If I understand the agreement, he is testifying to all the testimony the other agents

testified to. I think he should testify to how it was conducted.

The Court: The objection is sustained.

Mr. Freeland: I am not permitted to ask him about the field test?

The Court: We know the substance in the jars turned out to be lactose, not heroin, so it is not important as to how you test it.

Mr. Freeland: I have no further questions.

* * *

[The Court at this time entertained an Oral Motion to Suppress the Evidence of heroin, and arguments were heard on this motion.]

* * *

The Court: Well, the Motion to Suppress Evidence is denied.

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No. 71-1349

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In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT HOWARD BROWN A/K/A HOWARD BROWN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1972 (Pet. App. 6a). A petition

for a rehearing was denied on March 20, 1972 (Pet. App. 7a). The petition for a writ of certiorari was filed on April 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit for a search warrant was sufficient.

2. Whether, in a prosecution for assaulting federal agents seeking to arrest him, petitioner was denied a fair trial by reason of the prosecutor's reference, in his opening and closing arguments, to heroin found in petitioner's home.

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was found guilty on a one-count indictment charging forcible assault upon Bureau of Narcotics agents engaged in the performance of their official duties, in violation of 18 U.S.C. 111 (Tr. 394-395).[1] On April 29, 1971, he was sentenced to imprisonment for ten years and a $2,500 fine. The court of appeals affirmed *per curiam* (Pet. App. 1a-5a).

The evidence showed that on the evening of February 11, 1971, federal narcotics agents learned that petitioner was to receive that evening a quantity of narcotics which his wife was to deliver to a specified

[1] "Tr." refers to the two-volume transcript of the trial testimony, which we have filed with the Clerk of this Court.

location (Tr. 27, 74, 194). The agents kept petitioner's residence under surveillance and arrested his wife as she was proceeding from there to the delivery site. From the back seat of her automobile the agents recovered two jars containing a white powder, which they believed to be heroin (Tr. 27-28, 74, 194, 195). Five days later tests disclosed that the substance in the jars was not heroin, but lactose, a cutting agent for heroin (Tr. 216-219).

After the arrest of petitioner's wife, several federal agents went with John Salopek, the Chief of Police of White Oak Borough, Pennsylvania, to petitioner's residence to arrest him (Tr. 29-30). Salopek knocked on the door, identified himself, and asked petitioner to come down from upstairs so that he could talk to him (Tr. 142-144). When petitioner opened the inner door, Salopek showed his official police credentials. After petitioner opened the storm door and Salopek entered, he again showed petitioner his credentials and stated, "Here is my I.D., in case you are in doubt or anything" (Tr. 146, 151-152). While doing this, Salopek stated that there were federal narcotics agents outside who would like to see petitioner. In response petitioner grabbed a rifle, pointed it at Salopek, and ordered him to get out (Tr. 146, 153).

During a struggle between Salopek and petitioner for the rifle, agents Ashton, Guseman and Lund came up on the porch and identified themselves by yelling "Police, drop the gun," "Federal Agents, drop the

gun" (Tr. 39-40, 82-83, 206). Finally Salopek lost his grip on the rifle and petitioner shot agent Lund in the leg (Tr. 42, 157, 161-162, 208-210). Petitioner then retreated into the house where he remained for about thirty-five minutes after which he threw out the rifle used in the shooting and surrendered to the agents who had surrounded his house (Tr. 49-50). Agent Ashton testified that, during the period when petitioner was alone in the house just prior to his surrender, Ashton heard water running inside the house for approximately fifteen minutes (Tr. 50-51). Ashton also testified that a familiar method of destroying heroin was to flush it down a toilet or run it down a water drain (Tr. 51).

On the morning following the night of the shooting, February 12, 1971, the agents obtained a search warrant for petitioner's residence at 206 Cool Springs Road (Pet. App. 51a-53a). In the execution of this warrant the agents recovered a drainpipe from a laundry sink (Gov. Ex. 9) and a glass jar from an upstairs closet (Gov. Ex. 10). The court denied petitioner's motion to suppress these exhibits, both of which were shown to have contained heroin, on the ground that they were relevant as to petitioner's motive and intent and part of the *res gestae* (Tr. 271-278). The court also permitted the prosecutor to refer in both his opening and closing arguments (Pet. App. 21a, 27a, 34a, 40a, 45a, 46a) to the fact that heroin had been found in petitioner's residence.

Petitioner did not testify in his own behalf. Defense evidence showed that on February 12, 1971, at

12:33 a.m., someone named Brown made a telephone call from petitioner's residence to the local police (Tr. 305-312). An agreed stipulation stated that at 12:31 a.m. on that date the McKeesport Police Department received a telephone call for an ambulance to assist a federal agent who had been shot, and that some time later the police received a call from a Mr. Brown at 206 Cool Springs Road, who stated that he had been robbed (Gov. Ex. 12; Tr. 344-345).

ARGUMENT

1. Petitioner contends that since the affidavit for the search warrant included the assertion that the material found in the two jars in Mrs. Brown's car was heroin, the affidavit was rendered completely invalid and did not authorize the introduction in evidence of heroin seized at petitioner's residence (Pet. 7-9). This argument is predicated upon the erroneous premise that the affidavit stated that the two jars contained heroin; instead, the affidavit stated that they contained "white powder believed to be heroin" (Pet. App. 53a). There is no dispute in the evidence that, at the time when Mrs. Brown's car was stopped, the agents believed in good faith that the jars contained heroin (Tr. 28, 74, 195). Thus no inaccuracy in the affidavit existed.

Moreover, even if it be assumed *arguendo* that the above allegation in the affidavit was factually inaccurate, it was of "only peripheral relevancy to the showing of probable cause and * * * did not go to

the integrity of the affidavit." *Rugendorf* v. *United States*, 376 U.S. 528, 532.[2] Apart from this allegation, other statements in the affidavit were clearly sufficient to constitute probable cause for issuance of the search warrant. These included the informant's statement that petitioner had told him he had $40,000 of heroin in his possession; the information that heroin would be delivered by petitioner's wife to a certain restaurant; the confirmation of petitioner's name, address and telephone number as given by the informant; the observation of petitioner's wife proceeding toward the restaurant before she was stopped by the agents; and the statement of the informant that if petitioner did not receive a call within ten minutes after his wife made a delivery, his normal procedure was to destroy all narcotics and leave the area (Pet. App. 52a-54a). From the affidavit as a whole there was a more than ample basis for the Commissioner who issued the search warrant to conclude that heroin was concealed in petitioner's residence. See *Jones* v. *United States*, 362 U.S. 257; *United States* v. *Ventresca*, 380 U.S. 102; *United States* v. *Harris*, 403 U.S. 573.

2. There is no substance to petitioner's contention that he was denied a fair trial by reason of the prosecutor's references, in his opening and closing argu-

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[2] The factual situation in the instant case is totally unlike that in *United States* v. *Upshaw*, 448 F. 2d 1218, 1222 (C.A. 5), where there were numerous misstatements of fact which "struck at the heart of the affidavit's showing of probable cause."

ments, to petitioner's possession of heroin found in his home after execution of the search warrant (Pet. 10-11). Evidence as to petitioner's possession of heroin, even though relating to a crime other than the one for which he was being prosecuted, was admissible to show the underlying circumstances explaining the agents' presence for the purpose of arresting petitioner in the performance of their duties, *United States* v. *Ferrone*, 483 F. 2d 381, 385-386 (C.A. 3), and to show petitioner's motive in shooting the agent in order to gain time to dispose of the heroin in his house by flushing a water drain. See *Spencer* v. *Texas*, 385 U.S. 554, 560-561; *United States* v. *Puff*, 211 F.2d 171, 174-175 (C.A. 2), certiorari denied, 347 U.S. 963. Petitioner's possession of heroin was also admissible to rebut his defense that he had acted reasonably in shooting the agent because he believed he was being robbed. Cf. *United States* v. *Antrobus*, 191 F. 2d 969, 971 (C.A. 3), certiorari denied, 343 U.S. 902.

The prosecutor's reference to petitioner as "a heroin trafficker," to which no specific objection was made at the time (Pet. App. 35a), though perhaps too strong, was not entirely inappropriate in view of the informant's statement to agent Ashton that petitioner had $40,000 in heroin in his possession (Pet. App. 53a); the circumstances of the arrest of his wife; the circumstances of petitioner's arrest; and the subsequent finding of heroin in his house.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Opinion Below

The *per curiam* opinion of the United States Court of Appeals for the Third Circuit has not been reported at 456 F2d 569.

Argument

The Brief for the United States in Opposition to the Petition for Writ of Certiorari concedes (Brief in Opposition, p. 7) that the prosecutor's reference to petitioner as "a heroin trafficker" was, perhaps, too strong. Such is

considered not entirely inappropriate in view of several cited factors, purportedly gleaned from the record.

The most crucial factor relied upon by the government—that the informant's statement to Agent Ashton that petitioner had $50,000.00 in heroin in his possession (App. K, p. 53a)—was not before the jury but was testimony offered only in the suppression hearing. This erroneous assertion raises what is tantamount to a new argument: that the prosecutor in his closing may refer to matters testified to outside the presence of the jury. (This blending of the evidence before the jury and the evidence not before the jury was done also by the Court of Appeals in footnote 3 to its opinion, 456 F2d 569, 571.)

The complaint as to the action of the prosecutor is that the clearly prejudicial remarks were not supported by fact or inferences from fact which were before the jury but were based upon hearsay allegations in the Affidavit to the Search Warrant.

We respectfully submit that the combination of all of the other factors recited in the brief in opposition ("the circumstances of the arrest of the wife; the circumstances of petitioner's arrest; and the subsequent finding of heroin in his house") would not make the remarks of the prosecutor appropriate or permissible.

Respectfully submitted,

.....,

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